UNITED STATES
v.
CHARLES PESTRIKOFF

IBLA 92-256 Decided December 6, 1995

Appeal from a decision of Administrative Law Judge Ramon M. Child holding a claimant entitled to a Native allotment and directing issuance
of a Native allotment certificate. AA-7518.

Reversed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

The filing of a legally sufficient State protest pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1988), precludes a Native allotment application from being legislatively approved under the terms of the statute, even where the protest was subsequently withdrawn.

2. Alaska: Native Allotments--Evidence: Prima Facie Case

In a contest of a Native allotment claim, BLM establishes a prima facie case that the claimant failed to satisfy the use and occupancy requirements of the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), when it presents evidence that, on the basis of an on-the-ground examination of the parcels with the claimant present, it has been unable to confirm any qualifying use and occupancy due to the lack of any physical evidence of such activity.

3. Alaska: Native Allotments--Evidence: Preponderance

In a contest of a Native allotment claim, a claimant fails to overcome BLM's prima facie case of invalidity when the preponderance of the evidence demonstrates that the claimant never resided on the land, but instead used it about 10 days each year for a few hours for hunting, fishing, berrypicking, and gathering

> wood (never leaving any improvements or other physicalsigns of use), and that the land was used by other members of the local Native community without the claimant's express or implicit authorization. Under such circumstances, use and occupancy is both intermittent and not potentially exclusive of others.

APPEARANCES: Mary Anne Kenworthy, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Charles Pestrikoff; J.P. Tangen, Esq., Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Bureau of Land Management (BLM) has appealed from a decision of Administrative Law Judge Ramon M. Child, dated January 23, 1992, holding that Charles Pestrikoff is entitled to a Native allotment (AA-7518), and directing issuance of a Native allotment certificate.

On May 7, 1971, Pestrikoff filed, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), 1/ an application for a Native allotment of about 160 acres of land situated in unsurveyed sec. 33, T. 35 S., R. 27 W., and secs. 4 and 17, T. 36 S., R. 27 W., Seward Meridian, Alaska, along the Kaiugnak Bay on Kodiak Island near the village of Old Harbor. 2/ See Exh. 1. As surveyed by the United States, the land consists of 79.96 acres of land (parcel A) in lot 4 of U.S. Survey 9249, Alaska, and 79.97 acres of land (parcel B) in U.S. Survey 8947, Alaska. 3/ See Exh. 5 at 1 (MTP); Exh. 6 at 1 (MTP). The two parcels are situated

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1/ The Act of May 17, 1906, was repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1617(a) (Supp. IV 1992), effective Dec. 18, 1971, subject to applications pending on that date. The Act of May 17, 1906, authorized the Secretary of the Interior to allot "in his discretion and under such rules as he may prescribe" up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood, who resides in and is a native of Alaska and is the head of a family or 21 years of age. 43 U.S.C. § 270-1 (1970).

2/ In his application, Pestrikoff erroneously described the land sought as situated in unsurveyed sec. 33, T. 35 S., R. 27 W., and secs. 17 and 20, T. 36 S., R. 27 W., Seward Meridian, Alaska. See Exh. 1.

3/ In surveying the subject land, the United States obviously relied on the location of the two parcels posted on-the-ground by a BLM examiner, who in turn relied on statements by the applicant who was present during the field examination. See Tr. 24-25, 26, 34-35, 36-37, 39-40, 44; Exh. 2; Exh. 3 at 1, 3, 6, 7; Exh. 4 at 1, 3, 6, 7. As such, the surveys place the subject land in sec. 17, T. 36 S., R. 27 W., Seward Meridian, Alaska (parcel A), and sec. 33, T. 35 S., R. 27 W., and sec. 4, T. 36 S., R. 27

on opposite shores of the bay. See Exh. 2; Exh. 3 at 7; Exh. 4 at 7. Parcel B straddles Avnulu Creek where it empties into the bay. See Exh. 2; Exh. 4 at 1, 9. The parcels are about 12 (parcel B) and 16 (parcel A) miles from Old Harbor.

Pestrikoff reported in his application that the land was posted and that he had not placed any improvements on the land. See Exh. 1. He claimed use and occupancy of the land on a seasonal basis from July through December of each year (since July 1954) for subsistence purposes, i.e., hunting, fishing, and berrypicking. 4/ The record indicates that the subject land was included in the Kodiak National Wildlife Refuge (NWR) and withdrawn, subject to valid existing rights, from appropriation under the Act of May 17, 1906, by Public Land Order No. (PLO) 1634 on May 9, 1958 (23 FR 3350 (May 17, 1958)). 5/ This PLO has not been revoked. See Exh. 5 at 2 (Historical Index (HI)); Exh. 6 at 2 (HI).

On August 25, 1980, Lance Lockard, a BLM realty specialist, conducted a field examination of the subject land, in the company of Pestrikoff. See Tr. 11, 40; Exh. 3 at 4; Exh. 4 at 4. The examiner found that the land was not posted. See Exh. 3 at 3; Exh. 4 at 3. However, he noted that the claimant exhibited a familiarity with the land. See Tr. 27, 43; Exh. 3 at 4; Exh. 4 at 4. He also noted that the resources necessary to support the claimed uses were found on or near the land. See Tr. 25, 43; Exh. 3 at 4; Exh. 4 at 4. However, he could find no physical evidence confirming that

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fn. 3 (continued)
W., Seward Meridian, Alaska (parcel B). See Exh. 5 at 1 (Master Title Plat (MTP)); Exh. 6 at 1 (MTP). Both surveys were performed in 1987, accepted by BLM, and officially filed on Sept. 22, 1989.

4/ The record indicates that Pestrikoff was 27 years old when he initiated his use and occupancy of the subject land. See Tr. 73; Exh. 3 at 3. Also, he resided in Old Harbor until a few years before the September 1991 hearing. See Tr. 74; Exh. 1; Exh. 3 at 3; Exh. 4 at 3.

5/ At the time Pestrikoff reportedly initiated use and occupancy of the subject land in July 1954, it was not withdrawn from appropriation under the Act of May 17, 1906. Most of Kodiak Island had been temporarily withdrawn on Feb. 10, 1940, from "settlement, location, sale, or entry" for the purposes of classification and in aid of legislation by Exec. Order No. 8344 (5 FR 654 (Feb. 13, 1940)). Part of the withdrawn land (which included the subject land) was then designated on Aug. 19, 1941, part of the Kodiak NWR by Exec. Order No. 8857 (6 FR 4287 (Aug. 22, 1941)). Most of this land was withdrawn from "settlement, location, sale, or other disposition under any of the public-land laws applicable to Alaska." Id. However, excepted from the 1941 withdrawal was land, including the subject land, in a 1 mile-wide strip along the shoreline. See "Case File Abstract," Oct. 18, 1990 ("Both parcels within the Kodiak NWR and 1 Mile Strip").

the applicant had ever used and occupied the land for any purpose. 6/ See Tr. 25-26, 29, 43, 46; Exh. 3 at 4; Exh. 4 at 4. Thus, he concluded in two May 5, 1981, reports, with respect to each parcel: "Based on the lack of evidence supporting that the claimed activities actually took place, I cannot conclude whether the applicant has complied with the Act of May 17, 1906, as amended, and the regulations * * * set forth in 43 CFR [Subpart] 2561" (Exh. 3 at 5; Exh. 4 at 5). See also Tr. 29, 43-44, 56-57, 63.

On December 2, 1980, Congress enacted section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634
(1988), which provided in subsection (a)(1) for the legislative approval (with certain exceptions) of Native allotment applications pending on or before December 18, 1971, which describe land that was unreserved on December 13, 1968. Such approval was to take place on the 180th day following December 2, 1980. However, section 905 also provided, in subsection (a)(5), that a Native allotment application would not be legislatively approved, but must be adjudicated pursuant to the Act of May 17, 1906, where the State of Alaska filed a protest within 180 days after December 2, 1980, pursuant to section 905(a)(5)(B) of ANILCA,
43 U.S.C. § 1634(a)(5)(B) (1988). The State filed two section 905(a)(5)(B) protests of Pestrikoff's Native allotment application on June 1, 1981, within the 180-day period. See Exh. 7. One protest applied to parcel A and the other to parcel B. See Exh. 7 at 1, 8; Exh. 8 at 6. The protests were subsequently withdrawn by the State on June 30, 1982, and summarily dismissed by BLM on August 27, 1982. See Exhs. 8 and 9.

On September 20, 1990, BLM filed a contest complaint, charging that Pestrikoff had failed to satisfy the use and occupancy requirements of the Act of May 17, 1906, and its implementing regulations (43 CFR Subpart 2561) by not engaging in substantially continuous use and occupancy of the subject land, at least potentially exclusive of others, for a period of 5 years. Pestrikoff filed an answer on October 4, 1990, challenging
BLM's assertions.

The case was assigned to Judge Child for the purposes of conducting a hearing and issuing a decision on the merits of the contest. A hearing was held on September 10, 1991, before Judge Child in Kodiak, Alaska. At the conclusion of BLM's case, Pestrikoff moved for dismissal of the contest on the basis that BLM had failed to present a prima facie case that he had not satisfied the use and occupancy requirements of the Act of May 17, 1906. See Tr. 69-70. The motion was taken under advisement by the Judge, and
the claimant proceeded with the presentation of his case. See Tr. 72.

6/ In particular, the examiner could not find any improvements, e.g., cabin, cache, tent frame, fish wheel, boat dock, or fish racks, or any signs of use, e.g., boxes, firepits, trails, firewood cuttings, or cabin logs. See Exh. 3 at 4; Exh. 4 at 4.

In his January 1992 decision, Judge Child granted the motion to dismiss the contest on the ground that, as a matter of law, Pestrikoff's Native allotment application was legislatively approved by Congress, pursuant to section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988). In the alternative, Judge Child dismissed the contest of the validity of Pestrikoff's Native allotment claim, on the ground that BLM had failed to establish a prima facie case that the claim was invalid. Finally, Judge Child held that Pestrikoff had proved the validity of the allotment claim under the Act of May 17, 1906, by a preponderance of the evidence. BLM appealed from Judge Child's January 1992 decision.

In the statement of reasons for appeal (SOR), BLM first contends that Judge Child erroneously concluded that Pestrikoff's Native allotment application was legislatively approved by section 905(a)(1) of ANILCA where the State had filed timely protests pursuant to section 905(a)(5)(B) of ANILCA. BLM asserts that the fact the protests were subsequently withdrawn does not serve to reinstate legislative approval.

[1] The Board has held in a line of decisions that the timely filing of a legally sufficient section 905(a)(5)(B) protest by the State has the effect of precluding the legislative approval of Native allotment applications and requiring adjudication under the substantive provisions of the 1906 Act. Further, this line of precedent has held that the subsequent withdrawal of the protest does not have the effect of reinstating legislative approval. United States v. Galbraith, 134 IBLA 75, 91-95, 102 I.D. _ (1995); State of Alaska (Heirs of Lucy Charlie), 126 IBLA 204, 208 (1993); Marshall McManus, 126 IBLA 168, 171 (1993); Stephen Northway, 96 IBLA 301, 306 (1987). We have expressly declined to overrule Northway, which has long been followed by the Board. Edward N. O'Leary, 132 IBLA 337, 346 (1995); see United States v. Galbraith, supra.

However, noting that a "legally insufficient" protest would not preclude legislative approval of a Native allotment application, Judge Child ruled that the State's protests here were legally insufficient, and thus did not operate as a bar to legislative approval. See Decision at 4-6. This ruling had a two-fold basis. First, his determination that certain facts alleged in the protests (i.e., public use of the subject land for purposes of access to a seaplane base and boat launch (parcel A) and for access to a sport fishing area (parcel B)) were not confirmed by BLM during its August 1980 field examination. Second, Judge Child concluded that the State's withdrawal of its protests indicated the State's recognition of these facts. See Decision at 5.

It is true that, in order to preclude legislative approval of a Native allotment application, a State protest must be "legally sufficient." Stephen Northway, supra at 306 (citing United States v. Napouk, 61 IBLA 316, 322 (1982)). A legally insufficient protest will not suffice. See Marshall McManus, supra at 172. As we said in State of Alaska, 95 IBLA 196, 201-02 n.10 (1987): "An allotment applicant should not be put to the

proof of compliance [with the Act of May 17, 1906] by a protest utterly lacking in any merit, e.g., where the State has identified no legitimate public interest in access." However, we cannot conclude that the State's protests here were legally insufficient, in the sense that they identified no legitimate public interest in access. See State of Alaska, 95 IBLA at 201 n.10.

A legally sufficient protest by the State under section 905(a)(5)(B) of ANILCA is one in which the protest

> stat[es] that the land described in the allotment application is necessary for access to land owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and * * * states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist.

43 U.S.C. § 1634(a)(5)(B) (1988).

The protests generally stated that both parcels were necessary for access to Federal or State land or a public body of water. See Exh. 7 at 1, 8. They also specified that both parcels were necessary for access to "publicly-owned resources." Id. Specifically mentioned in the protest of parcel B was the need for access to sport fishing areas, noting the presence of stream habitat for anadromous fish species (Exh. 7 at 8). Attached to the protests were various documents generated in connection with the identification of public easements, in accordance with section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1976). 7/ These documents indicate that the subject land was considered necessary to provide public access to ocean beaches for recreation (including fishing and hunting), as they had in the past. See Exh. 7 at 2, 12. Finally, the protests stated that no reasonable alternatives for access existed. See Exh. 7 at 1, 8. The lack of any physical improvements associated with use of the land for boating or seaplane access does not itself invalidate the protest. See State of Alaska (Elliot R. Lind) (On Reconsideration), 104 IBLA 12 (1988); State of Alaska, 95 IBLA at 201-02. All of this rendered the protests legally sufficient in that they reasonably assured BLM that there was a "countervailing interest" in public access across the subject land that could be jeopardized by conveyance of the land to Pestrikoff, and thus required
the full adjudication of his allotment claim. 8/ See State of Alaska,

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7/ It appears from the record that Parcel A of the Pestrikoff allotment application conflicted with an Alaskan Native village selection application (Exh. 5).

8/ We also note that the fact that the protests were withdrawn does not necessarily establish that the State considered that they were in error.

95 IBLA at 201-02. As we said in State of Alaska, 95 IBLA at 201, section 905(a)(5)(B) of ANILCA "does not require [independent] verification [by BLM]." We find here, as we did in State of Alaska, that the "State has complied with the statute by providing facts 'concerning interference with access.'" 95 IBLA at 201.

BLM also argues that Pestrikoff's Native allotment application was not legislatively approved where the subject land was not "unreserved on December 13, 1968," as required by section 905(a)(1) of ANILCA. 43 U.S.C. § 1634(a)(1) (1988). BLM contends that the land was withdrawn by PLO 1634 on May 9, 1958, and remained withdrawn thereafter. The record supports this contention. By its terms PLO 1634 withdrew the subject land. It had not been revoked as of December 13, 1968. Hence, we must conclude that the subject land was not "unreserved on December 13, 1968," thus precluding the legislative approval of Pestrikoff's Native allotment application. See United States v. Rastopsoff, 124 IBLA 294, 299-300 (1992).

In the absence of legislative approval of Pestrikoff's Native allotment application, we turn to the question of whether he satisfied the use and occupancy requirements of the Act of May 17, 1906, and its implementing regulations. See 43 U.S.C. § 1634(a))(5) (1988). Section 3 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-3 (1970), expressly provided that no allotment would be made in the absence of satisfactory proof of "substantially continuous use and occupancy of the land [by the applicant] for a period of five years." See 43 CFR 2561.2(a). Departmental regulations further state that such use and occupancy contemplates the "customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family." 43 CFR 2561.0-5(a). They also state that use and occupancy must consist of "substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use." Id. 9/

BLM contends that Judge Child improperly determined that BLM failed to establish a prima facie case that Pestrikoff had failed to comply with the use and occupancy requirements of the Act of May 17, 1906, and its implementing regulations, and therefore that his Native allotment claim was invalid. We conclude the record does not support the finding of the Administrative Law Judge.

[2] In contests of Native allotment claims, the Government bears the initial burden of presenting a prima facie case that the claimant has not

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9/ The Board has noted that these regulatory requirements are "contrary to the cultural proclivity [of Alaskan Natives] for * * * communal use of land." See United States v. Akootchook, 123 IBLA 6, 10 (1992). Indeed, generally speaking, the Act of May 17, 1906, was "[not] intended to allow individual Natives to acquire lands used in common." Andrew Petla, 43 IBLA 186, 200 (1979) (Burski, A.J., concurring).

satisfied the use and occupancy requirements of the Act of May 17, 1906. See United States v. Estabrook, 94 IBLA 38, 43 (1986). Such a case generally consists of evidence which, on its face and without consideration of any of the evidence presented by the claimant, is sufficient by itself to demonstrate lack of compliance with the statutory requirements. Id. at 43. If a prima facie case is established, the burden shifts to the claimant to demonstrate his compliance with those requirements by a preponderance of the evidence. Id. at 51-52.

In the present case, Judge Child concluded that BLM had failed to present a prima facie case. See Decision at 8. He based this conclusion first on the fact that BLM had not conducted an on-the-ground examination of the entirety of the two 80-acre parcels sought by Pestrikoff or talked to other witnesses. See Decision at 8. It is true that the BLM examiner did not traverse all of the subject land, confining his on-the-ground activity generally to the shore areas. See Tr. 67. However, this was not necessary under the circumstances. The record reveals that Pestrikoff accompanied the BLM examiner on his visit to the parcels (Tr. 11, 69). Although the on-the-ground portion of the BLM field examination was limited to the vicinity of the shoreline, Pestrikoff was invited to disclose any evidence of use on the ground within the parcels (Tr. 26, 67). The record indicates that the examiner flew over the entire area of the parcels in a helicopter "at low level" (Tr. 67). See also Exh. 3 at 4; Exh. 4 at 4. While this would not have disclosed every bit of evidence of use and occupancy of the land, it would have disclosed evidence of significant use and occupancy (e.g., trails, structures, etc.). It did not disclose any evidence of use and occupancy. 10/ See Tr. 25-26, 29, 44; Exh. 3 at 4; Exh. 4 at 4.

The BLM examiner testified that he could not confirm any qualifying use and occupancy by the claimant since he could find no physical evidence

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10/ The combination of consultation with the applicant who was present at the examination and the aerial examination of the entirety of the parcels distinguishes this case from that in Estabrook where we found that BLM had failed to present a prima facie case on the basis of a partial on-the-ground field examination. See United States v. Estabrook, supra at 43-45. It also meets the standard enunciated in Linda L. Walker, 23 IBLA 299, 302 (1976) (cited by the Board in United States v. Estabrook, supra at 45):

"We do not suggest that an examiner needs to make an intensive investigation of every square foot of a parcel, but he should see enough to satisfy him that an applicant has probably not occupied any portion of the parcel * * *. He should not speculate that an applicant has not occupied the parcel unless he has viewed all portions of the tract where evidence of * * * use and occupancy might be found." (Emphasis added.)

The fact that Pestrikoff did not point out any evidence of use and occupancy suggests that there was none, and thus supports BLM's prima facie case.

that the claimant had ever used and occupied the subject land, and thus he could not conclude in his report that the claimant had satisfied these statutory requirements. 11/ See Tr. 25-26, 29, 43, 56-57, 63; Exh. 3 at 4, 5; Exh. 4 at 4, 5. It is true that certain of the claimant's activities on the land, i.e., hunting, fishing, and berrypicking, would not necessarily have left any physical evidence of use. Nevertheless, without more, the absence of such evidence is sufficient to establish that the claimant did not engage in substantial actual possession of the land to the potential exclusion of others. See Angeline Galbraith (On Reconsideration), 105 IBLA 333, 334-35 (1988); Angeline Galbraith, 97 IBLA 132, 168-69, 94 I.D. 151, 170-71 (1987). Therefore, we conclude that the absence of any physical evidence of use and occupancy was sufficient to establish a prima facie case that Pestrikoff had not used and occupied the land in the manner required by the Act of May 17, 1906. 12/ It was then up to Pestrikoff to offer testimony and other evidence regarding qualifying use and occupancy, and, by this means, establish his entitlement under the Act.

BLM further contends that Judge Child improperly determined that, even if BLM had established a prima facie case of lack of compliance with the use and occupancy requirements of the Act of May 17, 1906, Pestrikoff overcame that case by a preponderance of the evidence. BLM asserts that, even if Pestrikoff used and occupied the land, such use and occupancy was not substantially continuous for a period of 5 years, but rather intermittent. It also argues that the fact that Pestrikoff was using and occupying more than the two 80-acre parcels demonstrates that his use and occupancy of those parcels was not substantial actual possession of the land. Finally, BLM contends that Pestrikoff's use and occupancy was not to the potential exclusion of others.

Judge Child concluded that Pestrikoff overcame BLM's prima facie case with a preponderance of the evidence demonstrating that he had in fact
made substantial use of the subject land, potentially exclusive of others. See Decision at 10-11. He based his conclusion regarding substantial use

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11/ Judge Child found that BLM had failed to establish a prima facie
case in part on the basis that the examiner was "indecisive" in his assessment of Pestrikoff's use and occupancy (Decision at 8). We note that the examiner never expressly concluded in his reports that the claimant was not entitled to an allotment under the Act of May 17, 1906. See Exh. 3 at 5; Exh. 4 at 5. However, he did conclude that the evidence did not establish that the claimant had engaged in qualifying use and occupancy. See
Tr. 25-26, 29, 56, 63; Exh. 3 at 5; Exh. 4 at 5.

12/ In any case, where Pestrikoff proceeded to present his case-in-chief, even after moving to dismiss BLM's contest, all of the evidence presented by him (and BLM) may be considered for purposes of determining whether the preponderance of the evidence establishes that the requirements of the Act of May 17, 1906, have been met. See United States v. Estabrook, supra at 45.

on testimony that "the parcels are close to the village, plentiful in resources, and regularly used by [the claimant, in accordance with the local Native custom]." Id. at 10. He based his conclusion regarding potentially exclusive use on the fact that, although there was acknowledged use by others, there was no testimony refuting Pestrikoff's claim or asserting that the land was used in defiance of his claim. Id.

[3] BLM asserts that, according to the August 1980 BLM field examination, there was no physical indication that Pestrikoff had used and occupied the land. The record bears this out. See Tr. 25-26, 29, 43, 46; Exh. 3 at 4; Exh. 4 at 4. He did not inform the BLM examiner that there were any improvements or other signs of use on the land, despite being asked to do so. See Tr. 26-27, 64, 67. For the most part, Pestrikoff's use and occupancy of the land (i.e., hunting, fishing, berrypicking, and gathering wood) would not themselves have been likely to leave any trace. However, associated activities (e.g., skinning animals, cutting trees, and drying fish) would have left a trace. According to the BLM examiner, there was no such evidence of use. See Tr. 25-26, 29, 43, 46; Exh. 3 at 4; Exh. 4 at 4.

The absence of any physical evidence that Pestrikoff used and occupied the subject land during the 17-year period from initiation of use and occupancy in July 1954 until the repeal of the Act of May 17, 1906, in December 1971 precluded BLM from confirming use and occupancy. The evidence establishes that Pestrikoff did not use the subject land as a base camp for either hunting or fishing, repairing to the camp in the evening to dry fish or skin animals and to rest up for the next day's activity. Rather, the land was only a place where he would hunt, fish, pick berries, or gather firewood. He then "took the resources home" (Tr. 85). See also Tr. 88. Indeed, there is no evidence that he ever resided on the land, whether in a structure or otherwise. Rather, he testified that he generally travelled there from Old Harbor by boat and returned to the village during the course of a single day. 13/ See Tr. 77, 78-80, 87-88, 92. When he stayed overnight, it was on the boat. See Tr. 79, 92. He never stayed for more than one night at a time, in connection with his subsistence activities. See Tr. 92-93. Thus, the lack of any improvements or signs of activity associated with hunting, fishing, and berrypicking may be explained in part by the fact that Pestrikoff generally returned to the village the same day that he visited the land and never camped on the land. 14/ See Tr. 83.

13/ The BLM examiner confirmed that such "day trips" were "possible" (Tr. 66).

14/ On the other hand, Pestrikoff testified that one of his main activities was cutting trees (primarily, about 7-inch diameter alders, which were the preferred fuel source). See Tr. 76, 85-87 ("[W]e burnt a lot of alders"). Such cutting over the 17-year period prior to the repeal of the Act of May 17, 1906, should have left a trace (observable even from the air, at the time of the 1980 BLM examination). It did not.

Despite the absence of any physical evidence of use, the preponderance of the evidence establishes the fact that Pestrikoff used the subject land (prior to the repeal of the Act of May 17, 1906) for hunting, fishing, berrypicking, and gathering wood. 15/ See Tr. 25, 75, 76-77, 80, 85-86, 124-25. Indeed, he engaged in what is aptly termed a "subsistence lifestyle" to support his family. See Tr. 75, 76-77, 81. Pestrikoff testified that he did not limit his hunting, fishing, berrypicking, and wood gathering only to the subject land, since the sought-after resources were also found elsewhere and there were not enough resources on the subject land to support his family. 16/ See Tr. 76, 81, 81-82, 89, 90, 91-92, 98, 100.

The remaining issue is whether Pestrikoff's use of the subject land encompassed substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use. The evidence establishes that Pestrikoff used the subject land several times
a year. He testified that, in an average year, he went to the land about 10 times between July and December. See Tr. 103-04. The usual duration
of his visits varied from about 2 hours to half a day. See Tr. 79. His use consisted generally of "day trips." See Tr. 87-88. It is not enough
to say, as Pestrikoff does, that such use was in accordance with the "customary seasonality of use" by Natives in this area (43 CFR 2561.0-5(a)). See Tr. 139; Answer at 18. Indeed, the record does not support that assertion. The Department has said that "[s]easonal use means that
which follows a yearly pattern, such as picking berries or fishing as those seasons occur on a regular basis. Seasonal use is contrasted to intermittent use which may not occur on a regular basis" (Exh. C-2 at 1, emphasis added). It does not appear that Pestrikoff's use of the subject land did follow the seasons. In general, his subsistence gathering efforts occurred "year-round" (Tr. 89). Moreover, such use was infrequent at best and there were no improvements or other physical evidence of use left behind on the land during the periods of the claimant's absence. See Tr. 26-27, 83;

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fn. 14 (continued)
When specifically asked to report any "[s]igns of use * * * [including] firewood cutting," the BLM examiner stated: "None" (Exh. 3 at 4; Exh. 4 at 4). Pestrikoff has not contradicted this observation. Nor does the record explain the absence of any evidence of the reported tree cutting.

15/ According to Pestrikoff, his use and occupancy of the subject land ceased in about 1987. See Tr. 82-83.

16/ It appears from the record that the reason Pestrikoff applied for the subject land is that he was assigned these parcels by the local village, after indicating the general area where he desired an allotment. See
Tr. 95-97, 99. Although this fact alone does not establish that he did
not use and occupy the particular land or that such use and occupancy was not qualifying, it does explain the lack of any competing claim for the land. See Tr. 42-43, 62.

Exh. 1; Exh. 3 at 4; Exh. 4 at 4. This Board has held that the mere use of the land for a few days each year, without the presence of physical evidence of use and occupancy which would give notice to others of the prior appropriation of the land, would not constitute substantially continuous use and occupancy potentially exclusive of others. Angeline Galbraith (On Reconsideration), 105 IBLA at 334-35; Angeline Galbraith, 97 IBLA at 165-66; 94 I.D. at 169. There are two issues involved in cases such as this: whether the use is substantial and whether it is potentially exclusive of others. With respect to uses such as berrypicking, fishing, and hunting which may not leave physical evidence of use and occupancy in cases like the present, the question of substantial use hinges on the quantum of use. Angeline Galbraith (On Reconsideration), supra at 338. Qualifying use and occupancy must be "substantial actual possession and use of the land." 43 CFR 2561.0-5(a). Occasional visits such as that presented on the record in the present case constitute intermittent rather than substantial use.

BLM also asserts that the preponderance of the evidence demonstrates that Pestrikoff's use and occupancy was not potentially exclusive of others. We find that the record supports this conclusion.

It is clear that Pestrikoff recognized that, at no time, did he have the exclusive rights to use and occupy the subject land, and thus could not have precluded others from using it. See Tr. 80-81, 82, 88 ("I knew that wasn't my land"), 94, 101. This (by itself) does not demonstrate that his use and occupancy was not in fact potentially exclusive of others. However, Pestrikoff and George Inga, his brother-in-law, testified that they and others have used the subject land. See Tr. 80, 94, 125-26. Indeed, Pestrikoff testified that the parcels were used by the community. See Tr. 80, 94. Generally speaking, the Native residents of Old Harbor, who numbered between 400 and 500, likewise supported themselves by subsistence gathering (in addition to commercial fishing), and would undoubtedly have used the nearby subject land, which is located about 1-1/2 hours from the village by boat. See Tr. 66, 75, 76, 78-79, 88 ("[I]t was the way of life * * * down there"). According to Pestrikoff, the boat is the primary means of transportation for all of the residents of Old Harbor (other than the plane), since the village is not accessed by any roads. See Answer at 15.

Moreover, there is no evidence, even in the face of the use by others, that Pestrikoff exercised any authority or control over the use of the subject land, or (in any case) that his dominion over the land was recognized by others. 17/ In particular, there is no evidence that the use by others occurred with either his express or his implicit authorization. Rather, the evidence was to the contrary. Pestrikoff stated that he did not prohibit others from using the land and no one ever asked his permission to go

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17/ The absence of such evidence distinguishes the present case from that in Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128, 135-36 (1989). See United States v. Rastopsoff, supra at 306-07.

on it. See Tr. 94, 94-95, 101. Excluding others was not the custom. See Tr. 126. 18/ He also stated that it was not until after the 1987 surveys that others recognized the land as his. See Tr. 94, 100-101. Further, there was no physical indicia that Pestrikoff had any authority or control over the land. Clearly, he was only rarely on the land in any given year and there were no physical signs of his use of the land, such that others would have been put on notice that it was claimed by him. 19/ Together, all of this establishes that Pestrikoff's use and occupancy was not potentially exclusive of others. 20/ See United States v. Rastopsoff, supra at 307; Angeline Galbraith (On Reconsideration), 105 IBLA at 334-35, 338-39; Angeline Galbraith, 97 IBLA at 168-69, 94 I.D. at 170-71.

We, therefore, conclude that Judge Child, in his January 1992 decision, improperly held that Pestrikoff's Native allotment application
AA-7518 was legislatively approved by section 905(a)(1) of ANILCA; that

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18/ While the actual exclusion of others may not have been the local custom, there is no evidence of record of any use and occupancy by Pestrikoff in a manner which would put the public on notice that he claimed these lands.

19/ In determining whether use and occupancy was potentially exclusive of others, concern properly focuses on whether a claimant has actually used or left physical evidence of use on a parcel of land:

"Just as a visual sighting of a Native using a parcel of land would serve to apprise other individuals that the land was under occupancy, physical evidence of such use would be equally effective in alerting third parties to the existence of an outstanding claim to the land even when the Native was not present."

Angeline Galbraith (On Reconsideration), 105 IBLA at 335. Actual use or lingering evidence of use "provide[s] notice to others of [the claimant's] intention to segregate a particular parcel of * * * land from community use," and thus indicates that his use and occupancy is potentially exclusive of others (as required by 43 CFR 2561.0-5(a)). United States v. Heirs of David F. Berry, 127 IBLA 196, 209 (1993).

20/ It is not enough to say, as Pestrikoff does, that there were no competing claims for the land. See Tr. 139; Pestrikoff's Posthearing Brief at 16, 23. Indeed, the lack of competing claims does not necessarily establish that the claimant's use and occupancy was sufficient to put others on notice that the land was claimed by him or (in any case) that
the claimant was recognized by the community to have taken control of
the land by virtue of his use and occupancy, thus satisfying the potential exclusivity requirement. In the present case, the absence of competing claims is explained by the fact that all of the land used in common by
the Native residents of Old Harbor was "parcelled" out to them. See
Tr. 95-97, 99. This process does not demonstrate "community recognition
of Mr. Pestrikoff's superior claim to the [land]" (Pestrikoff's Posthearing Brief at 23). It was simply a way of avoiding conflicting claims.

BLM did not establish a prima facie case that Pestrikoff had failed to satisfy the use and occupancy requirements of the Act of May 17, 1906; and that Pestrikoff overcame that case by a preponderance of the evidence. Thus, we must reverse Judge Child's decision holding Pestrikoff entitled to a Native allotment and directing issuance of a Native allotment certificate. The record fails to support Pestrikoff's claim that he is entitled to a Native allotment and, therefore, his application is hereby rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge